[2014] JMCA Crim 11

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 41/2011

BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MR JUSTICE BROOKS JA
THE HON MS JUSTICE LAWRENCE-BESWICK JA (Ag)

JOEL DEER V R

Appellant's representative absent

Ms Sanchia Burrell for the Crown

19 and 20 February 2014

ORAL JUDGMENT

BROOKS JA

[1] On 12 June 2009, at about 1:00 pm, three men entered a store along Marcus Garvey Drive in the parish of Kingston, initially pretending to be customers. Eventually, one of them brandished a firearm and shot and injured Mr Norman Moffatt, the security guard who was stationed there. Thereafter, another of the men took Mr Moffatt's Sig Pro 9mm pistol. The men then left the premises and made good their escape. Mr Moffatt's firearm was not recovered.

[2] Mr Moffatt attended an identification parade, on 15 October 2009, where he pointed out the appellant, Mr Joel Deer, as one of the three miscreants. Mr Deer was eventually arrested, charged and indicted for the offences of illegal possession of firearm (two counts), robbery with aggravation (one count) and wounding with intent (one count).

[3] On 17 February 2011, after a trial before Simmons J (Ag) (as she then was), in the High Court Division of the Gun Court held in Kingston, Mr Deer was found guilty on all four counts on the indictment. He was sentenced, on 29 April 2011, to serve seven years imprisonment at hard labour in respect of each of the counts of illegal possession of firearm and 15 years imprisonment on each of the counts of robbery with aggravation and wounding with intent. All sentences were ordered to run concurrently.

[4] He applied for permission to appeal against his convictions and sentences. He filed four prospective grounds of appeal. They are as follows:

> "1. Misidentify [sic] by the Witness: - That the prosecution [sic] witness wrongfully identified me as the person or among any persons who committed the alleged crime.
>
> 2. Lack of Evidence: - that the prosecution failed during the Trial to put forward any piece of material, [scientific] or ballistic evidence or report to link me to the alleged crime.
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> 3. Unfair trial: - That the evidence and testimonies upon which the Learned Trial Judge relied on [sic] for the purpose to convict me, lack facts and credibility, thus rendering the verdict unsafe in the circumstances.

4. That the Learned Trial Judge failed also to warned [sic] herself of the contrasting and contradicting testimonies as presented by the prosecution witness and the outcome that same can have resulting in my conviction."

[5] On 24 October 2013, this court granted him permission to appeal, as it had some concerns in respect of the second count of illegal possession of firearm. It also granted him legal aid. Despite the fact that counsel had been assigned to assist him, there were no additional grounds of appeal filed on his behalf. The relevant notices were sent out in good time to counsel who had been assigned, but no counsel appeared on his behalf. The main issue considered by this judgment, therefore, is whether Mr Deer was properly convicted for the offence of illegal possession of firearm in respect of the item taken from Mr Moffatt.

[6] After anxious consideration, we agree with the submissions of the learned Deputy Director of Public Prosecutions, Ms Burrell, that none of the grounds filed by Mr Deer has any merit. The learned trial judge considered Mr Moffatt'sevidence in respect of his opportunity to identify his attackers. She gave herself a careful reminder of the issues involving visual identificaton. Her reminders in respect of those matters cannot be faulted.

[7] The learned trial judge also carefully considered the inconsistencies in respect of Mr Moffatt's evidence as well as the discrepancies between his evidence and that of Sergeant Desmond Roach, the police officer who conducted the identification parade. Having done so, she found that the inconsistencies and discrepancies did not

undermine Mr Moffatt's credibility and that, in any event, the majority were minor in nature.

[8] We are satisfied that there was more than ample evidence to support her findings of fact, that the opportunity to view the attackers was adequate, that the identification parade was fairly conducted and that Mr Deer was one of the persons who were involved in shooting and robbing Mr Moffatt. The convictions in respect of counts one, three and four of the indictment are therefore unassailable.

[9] The matter which initially caused the court some concern was the fact that the indictment included the count of illegal possession of firearm, in respect of the weapon that had been taken from Mr Moffatt. The concern was whether there was duplicity in the indictment, in that the weapon was alsothe subject of the count for robbery with aggravation and therefore the possession of it, by way of a "taking", was a part of the robbery transaction. The court later questioned whether there was sufficient evidencethat the weapon was a "lethal barrelled weapon" to satisfy the definition of a firearm for the purposes of the Firearms Act (the Act). This is because:

a. it was not used to commit a separate or substantive offence (what Ms Burrell describes as a "predicate offence"), and
b. there was no ballistics expert's report in respect of it.

[10] In considering the issue of the satisfaction of the definition of "firearm" it should first be noted that the definition is set out in section 2 of the Act. The definition states as follows:

> "'firearm' means **any lethal barrelled weapon from which any shot, bullet or other missile can be discharged**, or any restricted weapon or, unless the context otherwise requires, anyprohibited weapon, and includes anycomponent part of any such weapon and anyaccessory to any such weapon designed oradapted to diminish the noise or flash caused byfiring the weapon, but does not include any airrifle, air gun, or air pistol of a type prescribed bythe Minister and of a calibre so prescribed." (Emphasis supplied)

[11] In **R v Jarrett** (1975) 14 JLR 35, this court, considered the nature of the proof required to show that an object, which was the subject of a charge of illegal possession of firearm, satisfied the definition of a firearm. Luckhoo P in addressing the point stated, in part, at page 42G - I:

> "One of the questions raised in these appeals is the nature of the proof required to show that the object in the possession of the appellant was a firearm or an imitation firearm…It was conceded by Mr. Macaulay [counsel for the appellants] that although where the object was recovered the testimony or certificate of a ballistics expert should be offered by the prosecution yet proof that the object was a firearm, a lethal barrelled weapon from which any shot, bullet or other missile can be discharged, might otherwise be given where there is evidence:
>
> (a) of a direct injury to a person or persons which may or may not have resulted in death and which on medical evidence is a bullet wound; or
>
> (b) that there was some damage to property shortly after which a bullet was recovered and bullet marks found."

[12] Admittedly, the facts of this case do not fall in any of the categories contemplated by Luckhoo P. Nonetheless, after hearing Ms Burrell's careful and commendable submissions, we are satisfied that there was sufficient evidence for the tribunal of fact to have found that the object taken from Mr Moffatt was a firearm within the definition of the Act. This court, in **Julian Powell v R** [2010] JMCA Crim 14, has indicated it is for the tribunal of fact to determine whether that definition has been satisfied in any particular case.

[13] The learned trial judge considered the evidence in this regard. This is revealed at pages 245-246 of the transcript. There, she said, in part:

> "With respect to the second count, the complainant [Mr Moffatt] gave evidence that his licence [sic] 9mm Sig Pro pistol was removed from his waist by the accused man. He further states that he did not give the accused man permission to take his firearm. He also gave evidence that he had fired the said gun on several occasions. Based on this evidence, I am satisfied so that I feel sure that what has been described is a firearm within the meaning of the Firearm's [sic] Act and the court therefore has the jurisdiction to try the accused man on this indictment."

[14] The learned trial judge had, earlier in her summation, spoken, at pages 244-245 of the transcript, about Mr Moffatt's qualifications to speak about firearms. She recounted that "he was a licenced firearm holder and had been a security officer for 14 years. He had also been acquainted with gun [sic] for 7 - 8 years".

[15] We are, therefore, satisfied that the learned trial judge's finding, that this was a firearm within the definition of the Act, is unimpeachable.

[16] In respect of the possible duplication of the charges on the indictment, we are also satisfied by Ms Burrell's submission that the possession of a firearm, without having a licence or other authority for that possession, after unlawfully taking it from another person, constitutes a separate offence from the specific act of taking that firearm. We agree with learned counsel that, as the law stipulates that a person should not have a firearm in his or her possession without being licensed so to do, the taking of a firearm into one's custody, without lawful authority, is sufficient evidence of an intention to illegally possess that firearm. It would, therefore, constitute an offence which is separate and distinct from the act of taking.

[17] In **R v Glenroy Wilson and Others** (1988) 25 JLR, Mr Wilson was convicted for the offence of illegal possession of a firearm. The firearm had been assigned to a police officer. The trial judge accepted that Mr Wilson had taken the police officer's gun from its holster during a confrontation and struggle between them.

[18] One issue that concerned this court on an appeal from that conviction was whether the conviction could stand in light of the trial judge's acceptance that Mr Wilson "didn't intend to keep the gun either; he intended that it should go back to the police". Campbell JA, in delivering the judgment of this court, opined that the absence of the intention to keep the firearm did not undermine the conviction. He said at page 163:

> "Had the learned judge accepted Wilson's evidence that the firearm had been retrieved from the ground where it had fallen, there might be some basis for submitting that by the [statement about Mr Wilson's intention concerning the firearm] he meant that Wilson was not in unlawful

> possession of the firearm. But the learned judge rejected the defences of all the appellants. He made a specific finding that Wilson took the gun out of the holster 'just as [the officer] said he did'. Thus he meant in the above statement no more than that Wilson did not intend to permanently deprive [the officer] nor the Police authority for that matter of the firearm.
>
> Certainly he did not mean that Wilson was not in unlawful possession of the firearm **when he dispossessed [the officer] and "co instant" possessed himself of it**." (Emphasis supplied)

[19] That case is different from the present case because, after he had taken the weapon, Mr Wilson, it was accepted, pointed the gun at the police officer while others kicked and beat the officer. Campbell JA also addressed this aspect of that case at page 163:

> "The recited excerpts of the learned judge's summation disclose that he found that Wilson possessed himself of the firearm. His possession was not innocent namely as a mere conduit to pass it over to the police. He possessed it in order to intimidate and subdue [the officer]. Wilson had no licence to render lawful his possession. He was accordingly in illegal possession of the firearm."

Nonetheless, there is sufficient in those excerpts of the judgment to support the view that the taking of a firearm, during a criminal enterprise, without being licensed to render that possession lawful, amounts to the commission of the offence of illegal possession of a firearm.

[20] In the circumstances, we are satisfied that the appeal should be dismissed, the convictions and sentences should be affirmed, and the sentences ordered to be reckoned as having commenced on 29 April 2011. And we so order.